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SUPREME COURT OF THE UNITED STATES

No. 131--October Term, 1968

Carmine Vincent Palmieri,

Petitioner,

v.

State of Florida.

On Writ of Certiorari to the Supreme Court of Florida

## AMENDED PETITION FOR REHEARING

The petitioner, Carmine Vincent Palmieri, by his undersigned Court-appointed counsel, within the time allowed by the rules for the filing of a Petition for Rehearing, respectfully files this, his Amended Petition for Rehearing, and in support thereof would show unto the Court as follows:

1. A review of petitioner's handwritten Petition for Writ of Certiorari in this cause (a copy of which was furnished counsel by the Clerk at the time of his appointment) reveals that the question of petitioner's illegal arrest was raised before this Court (see Petition pp. 4-5). This Court apparently was of the same opinion when it granted the writ in the first instance on May 27, 1968.

2. The record also reveals that the question of an illegal arrest was preserved at the trial court level (Appendix pp. 4-5, 6-7, 8-9).

3. While it is true that the issue of an illegal arrest was not specifically asserted in petitioner's brief before this Court because that question had not been apparently raised in the Supreme Court of

Florida, the fact remains that petitioner's brief before this Court laid out the facts demonstrating the illegality of the arrest (petitioner's brief pp. 4-5).

4. On further reflection it is apparent that the issue was not raised before the Supreme Court of Florida because it was not within the scope of the District Court of Appeal's certification to the Supreme Court which was to the effect that this cause "concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant." (Appendix p. 34).

5. It is respectfully submitted that the petitioner should not be penalized by the deprivation of 20 years of his liberty as a result of the failure of his State Court counsel to pursue the illegal arrest issue. Questions affecting the constitutional rights of an individual which raise questions of fundamental error should be allowed to be raised at any time, where they appear on the face of the record. See Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798. See also Ford Motor Company v. Department of Treasury of the State of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389, 396 (1945). (Issue with respect to the Eleventh Amendment of the Constitution of the United States was considered even though urged for the first time in the Supreme Court.) This is also the rule in Florida. See 2 Fla.Jur., Appeals, Section 290, pages 633-634 wherein the general rule is stated that "...a fundamental constitutional error may be urged for the first time in the appellate court." (The cases are collected in the footnotes to the above citation.)

6. That the arrest in question was clearly illegal is not open to doubt. The arrest of petitioner was made at his home at 1:30 in the

morning without a warrant. The record shows that the arrest was made approximately a month after the alleged offense and, therefore, it could not be based upon the theory that it was an arrest for an offense committed in the presence of the arresting officer.

7. The record also shows an absence of probable cause for the making of the arrest.

8. With respect to probable cause for making the arrest, it is true, on page 15 of the record, that the prosecuting witness was shown photographs and purported to pick one person out from the photographs, but at no point in the record does it appear that the person picked out was the petitioner, Carmine Vincent Palmieri. To paraphrase this Court in Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, at 77, presuming probable cause from a silent record is impermissible.

9. A review of the transcript of oral argument will reveal that in a colloquy with Mr. Justice Stewart, counsel for the State conceded that the record failed to show probable cause for the arrest of the petitioner.

10. In this cause the record reveals that all of the evidence used against the petitioner was gathered by line-ups after the illegal arrest. It is true that the record reveals an in-court identification but this was made by the same person who had made the illegal line-up indentification and, as this Court pointed out in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, once a prosecuting witness has identified the accused in a line-up he is not likely to change his mind.

11. Evidence obtained during the detention resulting from an illegal arrest is excludable under the Due Process Clause and a conviction

based thereon cannot stand. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

WHEREFORE, this Court's recent order dismissing its Writ of Certiorari should be set aside and petitioner's conviction for armed robbery should be reversed.

Respectfully submitted,

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Counsel for Petitioner

I certify that the foregoing Amended Petition for Rehearing is presented in good faith and not for purposes of delay.

PHILLIP GOLDMAN

Sworn to and subscribed before me this 12th day of December, 1968.

Notary Public, State of Florida at Large.
My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Sept. 28, 1970
Bonded by Transamerica Insurance Co.